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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
09/491,708	01/26/00	AVEN	M 33546-01

INTELLECTUAL PROPERTY DEPARTMENT  
BASF CORPORATION  
3000 CONTINENTAL DRIVE-NORTH  
MOUNT OLIVE NJ 07828-1234

HM12/0202

 EXAMINER

PRYOR, A

ART UNIT	PAPER NUMBER
1616	9

**DATE MAILED:** 02/02/01

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

<b>Office Action Summary</b>	Application No. <b>09/491,708</b>	Applicant(s) <b>Aven</b>
	Examiner <b>Alton Pryor</b>	Group Art Unit <b>1616</b>

Responsive to communication(s) filed on Jan 10, 2001.

This action is **FINAL**.

Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

A shortened statutory period for response to this action is set to expire 3 month(s), or thirty days, whichever is longer, from the mailing date of this communication. Failure to respond within the period for response will cause the application to become abandoned. (35 U.S.C. § 133). Extensions of time may be obtained under the provisions of 37 CFR 1.136(a).

#### Disposition of Claims

Claim(s) 1-16 is/are pending in the application.

Of the above, claim(s) 4, 5, 9, 10, 13, and 14 is/are withdrawn from consideration.

Claim(s) \_\_\_\_\_ is/are allowed.

Claim(s) 1-3, 6-8, 11, 12, 15, and 16 is/are rejected.

Claim(s) \_\_\_\_\_ is/are objected to.

Claims \_\_\_\_\_ are subject to restriction or election requirement.

#### Application Papers

See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.

The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.

The proposed drawing correction, filed on \_\_\_\_\_ is  approved  disapproved.

The specification is objected to by the Examiner.

The oath or declaration is objected to by the Examiner.

#### Priority under 35 U.S.C. § 119

Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

All  Some\*  None of the CERTIFIED copies of the priority documents have been

received.

received in Application No. (Series Code/Serial Number) \_\_\_\_\_.

received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

\*Certified copies not received: \_\_\_\_\_

Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

#### Attachment(s)

Notice of References Cited, PTO-892

Information Disclosure Statement(s), PTO-1449, Paper No(s). 3

Interview Summary, PTO-413

Notice of Draftsperson's Patent Drawing Review, PTO-948

Notice of Informal Patent Application, PTO-152

--- SEE OFFICE ACTION ON THE FOLLOWING PAGES ---

## **Detailed Action**

### ***Election Requirement***

The elected non aqueous composition comprising metconazole is not allowable. Referring to applicant's election filed 1/10/01, **Synperonic 91-6** and **Rhodocae 70/B** are trademarks which are not allowed in claims. Also, **n-odylpyrrolidone** is not supported by the specification.

### ***Claim Rejection under 35 U.S.C. 112, 2nd paragraph***

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claim 8 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

3. Claim 8 recites the limitation "said adjuvant" in line 2. There is insufficient antecedent basis for this limitation in the claim.

4. A broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. Note the explanation given by the Board of Patent Appeals and Interferences in *Ex parte Wu*, 10 USPQ2d 2031, 2033 (Bd. Pat. App. & Inter. 1989), as to where broad language is followed by "such as" and then narrow language. The Board stated that this can render a claim indefinite by raising a question or doubt as to whether the feature introduced by such language is (a) merely exemplary of the remainder of the claim, and therefore not required, or (b) a required feature of

Art Unit: 1616

the claims. Note also, for example, the decisions of *Ex parte Steigewald*, 131 USPQ 74 (Bd. App. 1961); *Ex parte Hall*, 83 USPQ 38 (Bd. App. 1948); and *Ex parte Hasche*, 86 USPQ 481 (Bd. App. 1949). In the present instance, claim 8 recites the broad recitation a to b is between 1:0.5 and 1:100, and the claim also recites a to b is preferably between 1:1 and 1:10 which is the narrower statement of the range/limitation.

***Claim Rejection under 35 U.S.C. 103(a)***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 1-3, 6-8, 11, 12, 15 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Valcke et al (US 5,714,507; 2/3/98).

Valcke et al discloses an emulsifiable concentrate comprising a compound of formula a1 (metconazole), an alkoxylated alcohol (polyethylene oxide with propylene glycol or nonylphenol polyethoxy ethanol), an aprotic solvent (methylpyrrolidone), silicone material (Silicic acid), and an anionic surfactant (dispersant). See column 1 line 22 - column 2 line 34, column 6 line 22 - column 7 line 36, column 9 lines 33-44. Valcke teaches that the composition can exist as a non aqueous concentrate. See column 6 lines 13-44. Valcke teaches that the composition is employed in a method of combating fungi which comprises the application of the composition to fungi loci. See abstract. Valcke does not teach the composition comprising a) an alkoxylated alcohol with

Art Unit: 1616

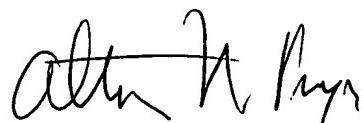
the instant number of carbons and b) the instant amounts and ratios of components. One having ordinary skill in the art at the time the invention was made would have been expected to determine the optimum carbon number for the alkoxylated alcohol component as well as the optimum amounts and ratios of ingredients for the instant composition. One would have been motivated to do this so the composition developed would have been effective when employed in the method of controlling fungal growth.

***Telephonic Inquiry***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Alton Pryor whose telephone number is (703) 308-4691. The examiner can normally be reached on Monday through Friday from 8:00 a.m. to 4:30 p.m.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jose Dees, can be reached on (703) 308-4628. The fax phone number for this Group is (703) 308-4556.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-1235.



Alton Pryor

Patent Examiner, AU 1616

1/31/01